IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-579

WILLIAM H. MARTIN, AND F. LOUISE MARTIN, HIS WIFE,
Petitioners

v.

GIRARD TRUST BANK, *Respondent*

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Of Counsel:
DAVID BERGER, P.A.
Attorneys at Law

DAVID BERGER
1622 Locust Street
Philadelphia, Pa. 19103
Attorney for Petitioners

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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The cornerstone of Respondent's opposition to certiorari is the mistaken idea that the opinion below can somehow be limited to a construction of Rule 60(b) (3), Fed. R. Civ. P. (Brief In Opposition at 3-4). Petitioners would also like to limit the scope of the error below as much as possible, but the plain language of the opinion simply admits of no such limited reading. "Viewing the petition as a mo-

tion under Rule 60,"[1] the Court of Appeals held, "*Rule 7 (b) requires* that the circumstances constituting the fraud must be alleged with particularity." 557 F.2d at 390; App. 35a.[2] The next sentence of the holding below is equally emphatic in its reliance on Rules 7(b) and 9(b), Fed. R. Civ. P. "*The requirements of Rules 7(b) and 9(b)* that the circumstances be stated with particularity merely restate the long standing rule at common law." *Id.* Nothing in Rule 60(b) contains a "particularity" requirement of any kind and so, of course, the court below did *not* hold that "Rule 60(b) requires . . .," or that "the requirements of Rule 60(b) merely restate the common law rule." Conspicuously absent from the list of Rules whose "requirements" are relied on is Rule 60(b) (3), to which respondent contends the holding below is somehow limited. Rather, the only reason particularity was required at all is that a motion for relief from judgment falls within the requirements of Rule 7(b)(1), Fed. R. Civ. P. This rule governs federal motion practice across the board.[3]

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1. The respondent's quotation of this part of the holding below as referring to Rule "60(*b*)" is mistaken. Compare Brief In Opposition at 3, last line, with 557 F.2d at 390 (App. 35a). The opinion below is not actually that specific; it refers only to "Rule 60" generally. This is but one indication of the caution with which respondent's Brief in Opposition should be addressed. Others are provided by respondent's suggestions as to the facts. For example, respondent claims that Martin "sought respondent's assistance and was introduced, at his request, to the other purchasers by respondent (App. 11a-12a)." Brief in Opposition at 9. The reference supports only the proposition that Martin was introduced to the other purchasers by respondent but does not support the idea that Martin "sought" respondents assistance or that the introduction was "at his [Martin's] request."

2. All emphasis is supplied unless otherwise indicated.

3. Rule 9(b), also relied on, governs federal pleading of fraud and mistake generally. Instead of limiting the holdings below, this reliance actually broadens that holding.

Moreover, the court below never once even mentioned Rule 60(b) (3) specifically. In its most particular moment, the opinion below refers only to Rule 60(b), generally. (App. 33a, 34a, 35a). It is not a little difficult to see exactly how a particular subpart of just one rule can be thought to form the basis of a holding without a single specific reference. It is much more difficult to see how that holding could be confined to that particular subpart without even so much as mentioning it once. Thus, the decision of the Court of Appeals simply is not restricted to Rule 60(b) (3), Fed. R. Civ. P. Rather, both the result reached below and the rationale of the opinion rest on the broad command of Rules 7(b) (1) and 9(b), Fed. R. Civ. P., governing federal motion and pleading practice generally.

Furthermore, the concerns for finality set out by respondent[4] are not even obliquely referred to anywhere in the opinion below.[5] It is enormously difficult to understand just how such unarticulated concerns for finality could conceivably form the basis of the holding below or limit its application to situations involving that entirely

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4. Brief In Opposition at 4 and 11.

5. The view of finality urged by respondent seems somewhat at odds with the "pragmatic", "practical" approach to finality embraced by this Court in *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962) and in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949); *see also* 15 Wright, Miller & Cooper, Federal Practice & Procedure §3913 (1976). In part, this "pragmatic" approach to finality earlier led those same professors to counsel: 'There is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits. (Footnote omitted.)." 11 Wright & Miller, *supra*, §2857 at 160. To the same effect is *id.* §2852 at 143. All of this the court below ignored in embracing a *single* test for relief from any judgment, a rule which respondent never seeks to justify but rather seems to recognize. (See Brief In Opposition at 13).

unmentioned policy. Since these concerns do not confine the decision below either, it thus seems only too clear that the threat to federal motion and pleading practice overall is dangerously real.

Respondent's Brief In Opposition vividly demonstrates the confusion created by the decision below. At page 3, Respondent states that the Court of Appeals ". . . enunciated a *pleading* standard limited to Rule 60(b) (3) *motions* . . .".[6] It seems respondent either now concedes that a *pleading* standard should have been applied to what, substantively, was a pleading, or respondent is simply suffering from the confusion created by the Court of Appeals' decision. It is plain, however, that applying such a *pleading* standard is what the Court of Appeals expressly refused to do. 557 F.2d at 389-390 (App. 35a). Thus, the need for authoritative resolution of what are—and what are not—the proper standards for motions for relief from judgment is clear.

Respondent next contends that the decision below is in accordance with other decisions nationwide. Nothing could be further from the truth. Not a single decision in the litany of cases cited by respondent in its Brief In Opposition (at 5) formulated the particularity requirement of either Rule 7(b) (1) or of Rule 9(b) as "merely a restatement of the long standing rule at common law", as did the court below. 557 F.2d at 390 (App. 35a). Rather, those cases actually stand only for the proposition that Rule 7(b) and Rule 9(b), Fed. R. Civ. P., do have particularity requirements, a proposition no one denies.[7] What is disturb-

6. Brief In Opposition at 3.

7. Each case, briefly sketched, in fact, held: *Segan v. Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975) (Complaint for violations of securities laws not sufficiently particular under Rule 9(b), Fed. R. Civ. P.); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975) (Complaint for violations of securities law *held sufficiently particular* under Rule 9(b), Fed. R. Civ. P.); *Felton v. Walston & Co., Inc.*, 508

ing is the formulation of those "particularity" requirements as mere restatements of the common law. By thus reading an earlier era's law into such broad provisions, important

F.2d 577 (2d Cir. 1974) (Complaint for violation of securities laws was not sufficiently particular under Rule 9(b), Fed. R. Civ. P.); *Segal v. Gordon*, 467 F.2d 602 (2d Cir. 1972) (Another securities complaint not sufficiently particular); *Jackson v. Alexander*, 465 F.2d 1389 (10th Cir. 1972) (Under Rule 9(b), Fed. R. Civ. P., averments of fraud in a complaint cannot be at odds with documents attached to the complaint; motion to dismiss granted.); *Douglas v. Union Carbide*, 311 F.2d 182, 185 (4th Cir. 1962) (Motion for a new trial *was* sufficiently particular under Rule 7(b), Fed. R. Civ. P. when made orally in court and later reduced to writing); *Upper West Fork Rivers Watershed Assoc. v. U.S. Corp. of Engineers*, 414 F. Supp. 908, 918 (N.D. W.Va. 1976) (Motion filed in opposition to other party's motion to dismiss was not sufficiently 'particular"; summary judgment, under Rule 56, Fed. R. Civ. P., was granted.); *Bartholomew v. Port*, 309 F. Supp. 1340 (E. D. Wis. 1970) (Motion to dismiss, after opportunity to amend, did not state grounds with particularity under Rule 7(b) (1), Fed. R. Civ. P.); *South v. United States*, 40 F.R.D. 374 (N. D. Miss. 1966) (Motion to strike a party defective for failure to comply with the particularity requirement of Rule 7(b)(1), Fed. R. Civ. P.); *United States v. 64.88 Acres of Land etc.*, 25 F.R.D. 88 (W. D. Pa. 1960) (Motion for new trial was too general and therefor motion was denied under Rule 7(b), Fed. R. Civ. P.); *Roebling Securities Corp. v. United States*, 176 F. Supp. 844 (D.N.J. 1959) (Motion made for the production of documents was denied under Rule 7(b)(1), Fed. R. Civ. P.; opportunity to amend was provided.); *Sachs v. Ohio Nat. Life Ins. Co.*, 2 F.R.D. 348 (N. D. Ill. 1942) (Motion to strike answer was intentionally lacking in particularity and was therefore denied under Rule 7(b) (1), Fed. R. Civ. P.); *Steingut v. National City Bank of N.Y.*, 36 F. Supp. 486, 487 (E.D.N.Y. 1941) (Motion to remand proceedings to state court must meet particularity requirements under Rule 7, Fed. R. Civ. P.); *Stebbins v. Keystone Ins. Co.*, 481 F.2d 501, 511 (D. C. Cir. 1973) (Motion for relief from judgment on grounds of fraud contained in affidavits failed to specify what "portions of these documents had been altered or falsified", 481 F.2d at 511.); *Aetna Casualty & Surety Co. v. Abbott*, 130 F.2d 40 (4th Cir. 1942) (Relied on distinction between extrinsic and intrinsic fraud, 130 F.2d at 43-44, rejected by Rule 60(b)(3) in

reforms of the Federal Rule of Civil Procedure are significantly imperiled.[8]

Far from being in accord with decisions nationwide, the decision below is almost exactly what the Ninth Circuit has rejected as an abuse of discretion. In *Butner v. Neustadter*, 324 F.2d 783 (9th Cir. 1963), defendant-appellant had signed a promissory note. Judgment was entered by default and a motion to set aside this judgment under Rule 60(b) (3), Fed. R. Civ. P., followed. In considering that motion, the *Butner* court first examined the California practice from which Rule 60(b), Fed. R. Civ. P., evolved:[9]

> " 'The legal principles underlying the granting of motions to set aside defaults are comparatively simple, and have been frequently announced by this court. The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal principles.' "
>
> " 'It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in con-

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the 1948 Amendment. See Advisory Committee Note to 1948 Amendment to Rule 60(b), 28 U.S.C. at 7827 (1970 ed.)); *U.S. v. $3,216.59*, 41 F.R.D. 433 (D.S.C. 1967) (Motion to open a default judgment under Rule 60(b)(1), Fed. R. Civ. P., failed to state the nature of the mistake alleged and only stated that some mistake occurred. The court also considered the particularity requirement of Rule 9, Fed. R. Civ. P.) The scope of the holdings involved seems quite clear from even this abbreviated catalogue.

8. Respondent's Brief In Opposition suggests that petitioners have read a novelty into the opinion below which is not there. (Brief In Opposition at 5). It is not, however, the novelty—but rather the common law antiquity—of the holding below that is so disturbing.

9. Rule 60(b), Fed. R. Civ. P., was originally taken from §473 of the California Code of Civil Procedure (Deering's Code, 1937). 7 *Moore's Fed. Practice*, ¶60.10[4] at 13.

> formity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.' . . . It is also well settled that it is the policy of the law to bring about a trial on the merits wherever possible, so that *any doubts which may exist should be resolved in favor of the application*, to the end of securing a trial upon the merits. . . . ' " 324 F.2d at 786, quoting *Brill v. Fox*, 211 Cal. 739, 743-744 (1931).

The *Butner* court continued:

> "In *Karlein v. Karlein*, the district court of appeal said:
>
> 'An appellate [*sic*] court listens more readily to an appeal from an order denying relief under Section 473 of the Code of Civil Procedure. *The law is remedial and any doubt as to the propriety of setting aside a default should be resolved in favor of the application, even in a case where the showing . . . is not strong*. . . . Neither party should be deprived of a hearing except when guilty of inexcusable neglect, and doubts should be resolved in favor of an application to set aside a default judgment.'
>
> "These statements are a good guide to action in this case. *Appellant contends he has a good defense on the merits, namely that the note in question was obtained by means of fraud* and that appellee is not a holder in due course. *Whether or not this is true*, if he is not guilty of inexcusable neglect, *he should have a hearing on the merits*." 324 F.2d at 786. (Footnote omitted.)

Not one word has been said so far about the merits of Martin's claims. The only issues that have been decided are whether or not Martin said enough, whether he said

it "particularly" enough and whether or not he should be granted leave to say more. Not even a single amendment has been allowed. It should be noted that the *Butner* court felt there was "considerable doubt about appellant's reasons." 324 F.2d at 787. The *Butner* court, however, like so many other courts, felt that "doubts should be resolved in favor of an application to set aside the judgment." *Id.* (Footnote omitted; quoting from *Karlein v. Karlein, supra.*) To very similar effect is *Schwab v. Bullock's, Inc.*, 508 F.2d 353 (9th Cir. 1974), wherein the court laid out excellent guidelines for the exercise of district court discretion in the consideration of Rule 60(b) motions, guidelines which, along with *Butner, supra*, were wholly ignored below. While the Ninth Circuit's cases involve vacating a default judgment rather than a judgment by confession, those decisions seem to reject exactly what the court below condoned. Neither the District Court nor the Court of Appeals paid any attention whatever to the holdings or guidelines set out by the Ninth Circuit, and the conclusion reached is contrary to both the rationale and the result of those decisions.[10]

Respondent next contends that the decision below is supported by an independent alternative holding, *to wit*, that the motion for relief from judgment was substantively insufficient as a matter of law. (Brief In Opposition at 6, *et seq.*). In fact, there was no alternative holding. The substantive holding portrayed by respondent clearly conflicts with substantive state law announced in *Young v. Kaye*, 443 Pa. 335 (1971). As such, the course of decision out-

10. In the recent case of *Greater Baton Rouge Craft Assoc. v. Rec. & Pk. Com'n*, 507 F.2d 227 (5th Cir. 1975), the Fifth Circuit also appears to be in conflict with the decision of the Court of Appeals in this case, but the factual situation involved is not as directly conflicting as that in *Butner, supra*. Nonetheless, it seems plain from the rationale that the Fifth Circuit would have reached a contrary result. 507 F.2d at 228.

lined by respondent is contrary to controlling substantive state law and is foreclosed by this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).[11] Moreover, it seems plain that any language regarding the *procedural* sufficiency of the motion below rested on and resulted from the holding requiring a "common law" particularity in federal motion and pleading practice. First, the single allegation which the Court of Appeals considered sufficiently "particular" was that Girard would look solely to Martin in the event of default. 557 F.2d at 390 (App. 36a). Second, this was the only allegation examined by the court below. *Id.* Thus, the Court of Appeals determined, "Furthermore, the charge that the Bank determined to relieve certain co-obligors cannot prevail as a matter of law."[12] *Id.* In sum, once the Court of Appeals had formulated the particularity requirement as merely a restatement of the common law rule, the court then disregarded all of Martin's other allegations and concluded that the motion, whittled down to a single allegation, was procedurally deficient. This is the direct result of the holding presented for review. It was not an independent ground of decision.

Respondent also argues that ". . . petitioners were afforded repeated opportunities to amend their petition at oral argument in response to continued questioning by the District Court. . . ."[13] In fact, no opportunity to amend was provided—whether at, before, during or after oral argument in the District Court or in the Court of Appeals. Martin was not even permitted to amend to state "more particularly" what the Court of Appeals apparently felt was

11. District Court jurisdiction was based on the diversity of the citizenship of the parties. (Complaint at ¶1).

12. This language follows language regarding what is "set forth" in the motion for relief from judgment. 557 F.2d at 390 (App. 36a).

13. Respondent's Brief In Opposition at 10. This is singularly misleading.

already stated—but was fatally lacking the requisite "particularity." Had the District Court actually allowed the opportunity to amend, as respondent claims, to, *e.g.*, incorporate all that was said at the oral argument in the District Court, the Court of Appeals might well have concluded that Martin's statement of the fraud was sufficiently "particular." In any event, there was *no* opportunity to amend at all.

Moreover, it is difficult to understand exactly how an amendment could conceivably be "futile" when the notes containing the authorizations for the judgments confessed below are alleged to be "*prima facie* voidable" under controlling state law. *Young v. Kaye, supra.*

Furthermore, the holding below that failure to allow an amendment was not an abuse of discretion, 557 F.2d at 390 (App. 36-37a), is all but directly in conflict with this Court's prior holding in *Foman v. Davis*, 371 U.S. 178, 182 (1962), in which this Court found an abuse of discretion for failure to grant leave to amend.

Last, respondent argues that no constitutional attack was made below and thus that questions reserved for later decision in *D. H. Overmeyer Co., Inc. of Ohio v. Frick & Co.*, 405 U.S. 174 (1972) are not presented on this record. Martin claimed that failure to open the judgment, allow amendment and/or discovery would work a denial of due process of law *as applied* in the District Court[14], in Martin's Brief[15] and Reply *Brief*[16] on appeal, at oral argument on appeal, and in his petition for rehearing below.[17] Martin did not, of course, claim that the confession of judgment clauses violated due process on their face. That contention

14. Transcript of District Court Oral Argument reprinted in 3d Cir. App. at 71a, 85a.

15. 3d Cir. Brief for Appellants at 20-25.

16. 3d Cir. Reply Brief for Appellants at 7-9.

17. 3d Cir. Petition for Rehearing at 13-15.

was foreclosed by this Court's decision in *Overmeyer, supra.* When the Court of Appeals seemed to share respondent's confusion, that mistaken view of Martin's position become a principal ground for rehearing.[18] Below, those cries fell on deaf ears. However, the constitutional claim that overall, *as applied*, the procedures indulged below operated to deny Martin due process of law, and the attendant right to trial by jury, was vigorously pressed at every stage of the proceedings.[19]

The decision below presents an alarmingly real threat to federal motion and pleading practice generally. The course charted below will plague and clog federal courts by devoting precious judicial energies to deciding what is and what is not "particular enough." The holding below threatens just such a useless dispute over form and phrasing every time a motion is made in a federal court. Similar disputes over form have caused the collapse of earlier judicial systems by diverting courts from deciding the merits of the cases presented. In large part, the Rules were designed to avoid such misallocations and to decide cases on their merits. By reading the very law those Rules were intended to change into the broad command of the Rules themselves, the decision below severely distorts the proper application of the Federal Rules of Civil Procedure. It introduces a startling inflexibility as an across-the-board standard for relief from judgment. It condones a course so radically departing from accepted notions as to deny due process of law in a fashion already considered by this Court as of constitutional dimension and specifically reserved by this Court for later decision. If allowed to stand, the decision below critically endangers many of the most significant reforms sought by the Federal Rules of Civil

18. *Id.*

19. In the District Court, the constitutional dilemma now presented was even anticipated. Transcript, *supra*, n.14 at *id.*

Procedure and dangerously imperils the just and expeditious course of civil litigation in federal courts.

A writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

DAVID BERGER
1622 Locust Street,
Philadelphia, Pa. 19103

Of Counsel:
DAVID BERGER, P.A.
Attorneys-at-law